

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF MICHAEL KOCH.

ESTATE OF MICHAEL KOCH, by SUSAN
KOCH, Personal Representative,

Plaintiff,

v

A. Z. SHMINA, INC.,

Defendant/Cross-Defendant-
Appellee/Cross-Appellant,

and

ORCHARD, HILTZ & MCCLIMENT, INC.,

Defendant/Cross-Plaintiff/Third-Party
Plaintiff-Appellant/Cross-Appellee,

and

REGAL RIGGING & DEMOLITION, LLC,

Defendant,

and

PLATINUM MECHANICAL, INC.,

Third-Party Defendant-Appellee.

FOR PUBLICATION
December 19, 2017
9:00 a.m.

No. 332583
Washtenaw Circuit Court
LC No. 13-001066-NO

Advance Sheets Version

Before: MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

Defendant Orchard, Hiltz & McCliment, Inc. (OHM) appeals by right the trial court's order dismissing this case, which plaintiff, the Estate of Michael Koch, filed after Michael was killed in an explosion at the village of Dexter's (Dexter) wastewater treatment plant. OHM was Dexter's engineer for an improvement project involving the wastewater treatment plant. OHM filed a cross-complaint seeking indemnity from defendant-contractor A. Z. Shmina, Inc., and a third-party complaint seeking indemnity from subcontractor Platinum Mechanical, Inc. The parties stipulated to dismissal of the case after the trial court denied OHM's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and granted Shmina's and Platinum's motions for summary disposition under MCR 2.116(C)(10). We affirm the trial court's denial of summary disposition in favor of OHM. We vacate the trial court's grant of summary disposition in favor of Shmina and Platinum, and we remand to the trial court for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

OHM initially contracted with Dexter in September 2011 to design upgrades to the sludge-handling process at Dexter's wastewater treatment plant. The services included replacing digester tank lids that had exceeded their design life. On June 12, 2012, OHM again contracted with Dexter for services including "contract administration, construction engineering, construction observation, and construction staking." OHM's contract incorporated a provision relieving it of responsibility for job-site safety.

Dexter hired Shmina in October 2012 as the contractor to improve the digester and sludge storage tanks. Dexter's contract with Shmina included general and supplementary terms containing indemnification provisions. Later in October 2012, Shmina subcontracted with Platinum, which agreed to provide labor and materials for digester lid demolition and installation. Platinum's contract incorporated the general, special, and supplementary terms of Shmina's contract with Dexter. In April 2013, Platinum awarded a subcontract to Regal Rigging & Demolition, calling for Regal to demolish, remove, and haul away two digester tank lids.

According to Jeremy Cook, Platinum's job foreman, there were weekly progress meetings in OHM's job trailer. Cook stated that Chris Nastally of OHM discussed "anything that had to do with that job" at the meetings, including job safety. Meeting minutes indicated that a progress meeting was held on April 11, 2013, and that Nastally, Sherri Wright, and Rhett Gronevelt of OHM; Cook and Kenneth Coon of Platinum; John Franklin of Shmina; and Jeff LaFave of Regal were in attendance. The minutes indicated that Regal planned to start demolishing the digester lids on April 12 and that the primary lid would be removed first. The minutes also indicated that the only "hot" work would be to cut holes in the lids and pull them out. Coon testified that at the meeting, Regal was instructed that it could only cut holes in the primary digester for rigging purposes and "[t]here was to be no other cutting on that job site whatsoever." Coon stated that anyone on the job site should have known that there should be no cutting torches on the secondary digester.

On April 22, 2013, the secondary digester exploded, resulting in Koch's death. Wright, an environmental engineer, testified that she was on the site the week before the explosion because Nastally was on vacation. Wright testified that on the morning of the explosion, she

walked the site with Nastally, talked about the areas that had been worked on, and told Nastally that the secondary digester still contained sludge.

Franklin, Shmina's project supervisor and site safety officer, testified that the primary digester had been cleaned and purged. Franklin also testified that OHM, Platinum, and Nastally would have known that only one digester could be worked on at a time. According to Franklin, David McBride of Regal began cutting the side beams on the secondary digester tank at around 10:00 a.m. or 10:30 a.m., and Franklin was concerned about the methane in the digester.

Cook testified that Franklin approached him at around 10:00 a.m. and told him that "the guys from Regal [were] doing some hot work and he was worried that they were blowing sparks on the roof" Cook stated that he approached McBride, told him that he was not supposed to be working on the secondary digester, and specifically mentioned that there could be methane gas.

Cook testified that he did not see McBride cutting again that day. However, Franklin testified that he saw McBride again cutting at around 1:00 p.m. or 1:30 p.m. on the roof line. According to Franklin, he went onto the roof and told McBride to stop working and that it was dangerous to work there. Franklin stated that McBride shut off his cutting torch and walked over to the primary digester, at which point Franklin left to have a conversation with Cook. McBride testified that "somebody" told him to cut the bolts with a torch and that if someone had told him to stop cutting or to cut in a different location, he would have moved.

Nastally testified that he was on the roof for about four minutes before the explosion. Nastally stated that if he was looking at someone who was cutting, he would have known they were cutting, but he was not paying attention to whether there were sparks. When asked whether he knew that the tanks contained methane gas when they had sludge in them, Nastally testified, "I guess I never thought about it." Nastally also testified that it was not his responsibility to know whether there was methane gas or to make sure the digesters did not explode. Nastally testified that he took a couple of pictures and then responded to an e-mail on his phone, which he was looking down at when the explosion occurred.

McBride testified that in one of the photographs Nastally had taken, he can be seen cutting the center bolts of the digester, that he had cut about one-half of the bolts, and that it took him about five minutes to cut each bolt. McBride testified that when he is cutting, he creates sparks, smoke, a loud noise, and a burnt metal smell. Wright testified that if she had been standing where Nastally had been standing when he took the photograph, she would have been concerned for the safety of everyone in the area, and that anyone on-site should have informed Franklin about McBride's activities.

The estate sued Shmina and OHM,¹ alleging in pertinent part that Dexter had warned Shmina and OHM not to work on any digester until it was emptied and cleaned to eliminate

¹ The estate did not name Platinum as a defendant because the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, was the estate's only remedy against Platinum, which was Koch's employer.

methane hazards, that the secondary digester had not been emptied, that Shmina and OHM knew the secondary digester still contained sludge, and that McBride was photographed cutting bolts on the secondary digester within minutes of the explosion. The estate alleged that McBride's cutting torch ignited methane in the secondary digester, which launched the lid into the air and caused Koch's death.

OHM filed a cross-claim against Shmina, alleging in pertinent part that Shmina had breached its contract with OHM by refusing to indemnify and defend OHM against the Estate's complaint and by failing to purchase project insurance that would have protected OHM from claims against it. OHM also filed a third-party complaint against Platinum, in which OHM made the same allegations.

OHM moved for summary disposition under MCR 2.116(C)(10) against Platinum and Shmina, alleging that OHM was an intended third-party beneficiary of Platinum's and Shmina's contracts with Dexter and that Platinum and Shmina were required to indemnify, defend, and hold harmless OHM. In response, Platinum asserted that the contract's general and supplementary provisions conflicted, creating an ambiguous agreement that the trial court should construe against OHM. Shmina responded that OHM could not reasonably observe practices that its engineers knew to be dangerous and do nothing. OHM replied that the parties' contracts required them to defend and indemnify OHM regardless of the cause of the accident and that the contracts' general and supplementary provisions did not conflict.

At an April 22, 2015 motion hearing, the trial court asked counsel if they were familiar with MCL 691.991, also known as the indemnity-invalidating act (the act), which no party had cited. The trial court then read MCL 691.991. OHM argued that it was not a public entity under the statute. The trial court ultimately denied OHM's motion for summary disposition, ruling that MCL 691.991 was clear and prohibited OHM from seeking indemnification for its own negligence. The trial court subsequently denied OHM's motion for reconsideration and reaffirmed its determination that MCL 691.991 applied retroactively.² The court also stated, as an alternative basis for its denial of OHM's motion for summary disposition, that the internally inconsistent nature of the indemnification clauses at issue created an ambiguity, and it accepted Shmina's position that an express indemnity contract should be construed strictly against the drafter and the indemnitee.

Platinum and Shmina subsequently filed motions for summary disposition under MCR 2.116(C)(10), alleging that the indemnification agreements were void or precluded by MCL 691.991. Shmina argued that any indemnification would indemnify OHM for its own negligence. In response, OHM argued that it was not responsible for supervising or controlling construction, that the statute did not apply to contracts between private entities, and that the

² Although MCL 691.991 was not yet effective on the dates the parties contracted, the alleged negligence giving rise to the accidental explosion occurred after the effective date of the statute. See 2012 PA 468, effective March 1, 2013; *Brda v Chrysler Corp*, 50 Mich App 332; 213 NW2d 295 (1973).

statute allowed indemnification as long as no party was held liable for more than its proportionate share of fault.

The trial court summarized the question as whether MCL 691.991 eliminated or limited indemnity provisions in public contracts. The trial court granted summary disposition in favor of Platinum and Shmina on the basis that MCL 691.991 precluded indemnity and the parties' contractual provisions were therefore void and could not be severed because the contracts provided more indemnification than the statute allowed. The parties then settled their claims with the estate and filed a stipulated order to dismiss the case.

After oral argument, this Court, on its own motion, ordered the parties to file supplemental briefs on the issue of the retroactive application of MCL 691.991(2).³ Because resolution of that issue disposes of the case before us, we address that issue first.

II. RETROACTIVITY OF MCL 691.991(2)

We hold that MCL 691.991(2) is subject to prospective application only and that the trial court therefore erred by granting summary disposition in favor of Platinum and Shmina regarding their obligation to indemnify OHM. This Court reviews de novo issues of statutory interpretation, *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014), and reviews de novo a court's decision on a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(5). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

When interpreting a statute, this Court's goal is to give effect to the intent of the Legislature. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). The language of the statute itself is the most reliable indicator of the Legislature's intent. *Id.* If the statutory language is unambiguous, this Court must enforce the statute as written. *Id.* We read and understand statutory language in its grammatical context unless the language indicates a different intention. *Id.*

"An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." *Miller-Davis*, 495 Mich at 173. Parties have broad discretion to negotiate such contracts. *Id.* However, MCL 691.991(2) provides that in any contract for the maintenance or demolition of infrastructure, a public entity shall not require a contractor to indemnify the public entity for any amount greater than the contractor's degree of fault:

³ *Koch Estate v A Z Shmina, Inc*, unpublished order of the Court of Appeals, entered July 14, 2017 (Docket No. 332583).

When entering into a contract with a Michigan-licensed . . . professional engineer . . . for the design of a building, . . . or other infrastructure, . . . or a contract with a contractor for the construction, alteration, repair, or maintenance of any such improvement, including moving, demolition, and excavating connected therewith, a public entity shall not require the . . . professional engineer . . . or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the . . . professional engineer . . . or the contractor and that of his or her respective subconsultants or subcontractors. A contract provision executed in violation of this section is against public policy and is void and unenforceable.

We agree that application of MCL 691.991(2) would compel the result reached by the trial court. But in this case, the parties entered into and executed their respective contracts in 2011 and 2012.⁴ MCL 691.991(2) became effective on March 1, 2013, and the digester exploded on April 22, 2013. Accordingly, the contracts pertinent to this dispute were entered into before the effective date of the statute.

The question therefore becomes whether MCL 691.991(2) may be applied retroactively. Statutes are presumed to operate prospectively unless “the contrary intent [of the Legislature] is clearly manifested.” See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). “This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions.” *Id.* See also *id.* at 588 (holding that a statute concerning sales commission payments could not be applied retroactively because retroactive application would substantially alter the nature of agreements that were entered into before the act’s effective date).

This Court has held that a pre-2013 version of the indemnity-invalidating act should be given retroactive effect, at least when the negligent act occurred after the effective date of the act. See *Brda v Chrysler Corp*, 50 Mich App 332, 335-336; 213 NW2d 295 (1973); cf. *Blazic v Ford Motor Co*, 15 Mich App 377; 166 NW2d 636 (1968) (holding that the act did not apply when the negligent act occurred before the effective date). Indeed, it was *Brda* on which the trial court relied in this case when it concluded that MCL 691.991(2) was retroactively applicable. However, the act, before its 2013 amendment, did not contain any of the language now found in MCL 661.991(2). Rather, the entirety of the pre-2013 act read:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the

⁴ Platinum subcontracted with Regal on April 17, 2013, but that contract is not pertinent to the issues before us.

sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [MCL 691.991, as enacted by 1966 PA 165 (before amendment by 2012 PA 468, effective March 1, 2013).]

This language closely mirrors the postamendment language of MCL 691.991(1):

In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Both the pre-2013 act and MCL 691.991(1) of the current act prohibit a general contractor from requiring its subcontractors to indemnify it for its sole negligence. See *Miller-Davis*, 495 Mich at 173; *Robertson v Swindell-Dressler Co*, 82 Mich App 382, 389; 267 NW2d 131 (1978). By contrast, MCL 691.991(2), which took effect in 2013, concerns the issue at hand—the extent to which a public entity may require a general contractor or subcontractor to indemnify it. And MCL 691.991(2) uses substantially different language than the preamendment statute and the current MCL 691.991(1). MCL 691.991(1) refers to sole-negligence indemnification clauses in contracts in an essentially timeless manner—if a contract exists with a sole-negligence indemnification provision, that provision is void and unenforceable. By contrast, MCL 691.991(2) speaks to contract *formation* in three places: it provides that “[w]hen entering into a contract,” a public entity “shall not require” a general contractor to indemnify it beyond the general contractor’s or its subcontractors’ degree of fault. And “[a] contract provision *executed* in violation of this section is against public policy and is void and unenforceable.”⁵ (Emphasis added.)

The Legislature’s use of different terms suggests different meanings. *United States Fidelity Ins*, 484 Mich at 14. Further, our Supreme Court has discussed “two signals” that indicate the Legislature’s intent that a statute be applied prospectively: the first is that the “Legislature included no express language regarding retroactivity,” and the second is that the statute imposes liability for failing to comply with its provisions. *Frank W Lynch*, 463 Mich at 583-584. The Legislature knows how to make clear, through express language, its intention that a statute operate retroactively. *Id.* at 584. And it is impossible for a party to comply with a statute’s provisions before that statute’s existence. *Id.*

⁵ A contract is generally executed (i.e., brought into its final, legally enforceable form) by signing and delivering it. See *Black’s Law Dictionary* (10th ed), p 393 (defining “executed contract”), p 689 (defining “execute”). The contracts at issue provided that they were effective on the date the last party signed and delivered them, if another date was not specified. Except for Platinum’s contract with Regal, which was initiated in 2013, all relevant signature dates and specified effective dates for the contracts and amendments at issue were in 2012.

Both of those signals are present here. MCL 691.991(2) contains no express language concerning retroactivity. In fact, the 2013 amendment specified that “this amendatory act takes effect March 1, 2013.” 2012 PA 468. And MCL 691.991(2) states that “[a] contract provision *executed in violation of this section* is against public policy and is void and unenforceable.” (Emphasis added.) Before March 1, 2013, MCL 691.991(2) did not exist, and contracts could not be executed in violation of it. See *Frank W Lynch*, 463 Mich at 584 (in which the Supreme Court, referring to the sales representatives’ commissions act (SRCA), MCL 600.2961, stated: “Further indicating that the Legislature intended prospective application of the SRCA is the fact that subsection 5 of the SRCA provides for liability if the principal ‘fails to comply with this section.’ Because the SRCA did not exist at the time that the instant dispute arose, it would have been impossible for defendants to ‘comply’ with its provisions. Accordingly, this language supports a conclusion that the Legislature intended that the SRCA operate prospectively only.”).

We conclude that the language of the amendatory act does not clearly manifest the Legislature’s intent that MCL 691.991(2) be applied retroactively to contracts entered into and executed before the amendment’s effective date. See *id.* at 583. The trial court therefore erred by applying MCL 691.991(2) to the claims before it. Accordingly, we vacate the trial court’s grant of summary disposition in favor of Shmina and Platinum. The trial court erred when it held that MCL 691.991(2) rendered void and unenforceable the indemnification provisions at issue, and we remand for reinstatement of OHM’s indemnity claims.

III. CONTRACTUAL AMBIGUITY

Shmina argues that the trial court’s determination that the contracts were ambiguous provides an alternative basis for granting summary disposition in its favor. More specifically, Shmina contends that the contractual ambiguity must be construed against OHM as the drafter of the contracts and that, therefore, this Court should hold that the broader indemnification provision of the supplementary conditions may not be enforced by OHM. OHM argues that the contractual provisions are not ambiguous because they are complementary.

We agree with the trial court that the contractual indemnification provisions are ambiguous, and for that reason, we affirm the trial court’s denial of summary disposition in favor of OHM. However, the trial court did not rely on the contractual ambiguity as a basis for granting summary disposition in favor of Shmina or Platinum, and we decline to do so in the first instance. Rather, we conclude that the ambiguity presents a genuine issue of material fact, requiring a remand to the trial court.

This Court reviews de novo the proper interpretation of a contract, *Miller-Davis*, 495 Mich at 172, and the legal effect of a contractual clause, *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). If a contract’s language is unambiguous, “we construe and enforce the contract as written.” *Quality Prods*, 469 Mich at 375. A contract is ambiguous when its provisions irreconcilably conflict. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). A court may not ignore provisions of a contract in order to avoid finding an ambiguity. *Id.* Generally, “the meaning of an ambiguous contract is a question of fact that must be decided by the jury.” *Id.* at 469.

Dexter's contract with Shmina expressly incorporated general conditions, supplementary conditions, insurance requirements, specifications, and drawings. Platinum's contract with Dexter included Platinum's contractual provisions as well as an incorporation of Shmina's contract with Dexter. When a contract incorporates a writing by reference, it becomes part of the contract, and courts must construe the two documents as a whole. *Whittlesey v Herbrand Co*, 217 Mich 625, 627; 187 NW 279 (1922).

The general conditions in Article 6, ¶ 6.20(A) of the Standard General Conditions of the Construction Contract between Dexter and Shmina provided, in pertinent part, as follows:

To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer . . . *against all claims, costs, losses, and damages . . . arising out of or relating to the performance of the Work . . . but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, . . . or any individual or entity directly or indirectly employed by any of them . . .* [Emphasis added.]

Paragraph 6.20(C)(2) also provided that "[t]he indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer . . . arising out of . . . giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage."

The Supplementary General Conditions "amend[ed] or supplement[ed] the Standard General Conditions of the Construction Contract . . . as indicated below. *All provisions which are not so amended or supplemented remain in full force and effect.*" The supplementary conditions deleted ¶¶ 5.04 to 5.10⁶ from the General Conditions and added to Article 5 language that "[t]he Insurance Specifications, Section 00 80 00, of this Contract, following the Supplementary Conditions, shall be added to Article 5 of the General Conditions, regarding insurance requirements." The insurance specifications in § 00 80 00, provided as part of the supplementary conditions, required Shmina to indemnify OHM as follows:

The CONTRACTOR agrees to indemnify, defend, and hold harmless the OWNER and ENGINEER, their consultants, agents, and employees, from and *against all loss or expense* (including costs and attorney's fees) by reason of liability imposed by law upon the OWNER and ENGINEER, their consultants, agents, and employees for . . . damages because of bodily injury, including death at any time resulting therefrom, arising out of or in consequence of the performance of this work, *whether such injuries to persons or damage to property is due, or claimed to be due, to the negligence of the CONTRACTOR, his subcontractors, the OWNER, the ENGINEER, and their consultants, agents, and employees*, except only such injury or damage as shall have been occasioned by

⁶ The Standard General Conditions of the Construction Contract was divided into 17 articles. The articles were further divided into numbered "paragraphs." We understand the reference in the Supplementary General Conditions to "Articles 5.04 – 5.10" to refer to ¶¶ 5.04 to 5.10.

the sole negligence of the OWNER, the ENGINEER, and their agents and/or consultants. [Emphasis added; formatting omitted.]

Because the supplementary conditions did not modify ¶ 6.20, that provision remained in full force and effect.

These provisions irreconcilably conflict because it is not possible for Shmina or Platinum to both indemnify OHM for (1) *all* damages, *regardless* of who caused them, under § 00 80 00, and (2) *some* of the damages, *only if* Shmina or Platinum or its subcontractors caused them, under ¶ 6.20. Therefore, the trial court did not err by holding that these provisions in Shmina's and Platinum's contracts were ambiguous.

But the trial court did not grant summary disposition in favor of Shmina or Platinum on this basis. The trial court only relied on the contractual ambiguity as an alternative basis for denying OHM's motion for summary disposition. And we conclude that, because of the contractual ambiguity, it was appropriate for the trial court to decline to grant summary disposition in favor of OHM.

However, it would have been inappropriate, absent consideration of relevant extrinsic evidence and other means and rules of contract interpretation, for the trial court to have relied on the contractual ambiguity as a basis for granting summary disposition in favor of Shmina or Platinum, and the trial court did not in fact do so. Generally, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp*, 468 Mich at 469. The relevance, if any, of the rule of *contra proferentem* that Shmina asks us to employ, is generally for the jury, not the trial court (or this Court), to consider, and then only in certain circumstances. According to *Klapp*:

In interpreting a contract whose language is ambiguous, *the jury* should also consider that ambiguities are to be construed against the drafter of the contract. This is known as the rule of *contra proferentem*. However, this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean. . . . In other words, if a contract is ambiguous regarding whether a term means "a" or "b," but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean "b," then the term should be interpreted to mean "b," even though construing the document in the nondrafter's favor pursuant to an application of the rule of *contra proferentem* would produce an interpretation of the term as "a."

However, if the language of a contract is ambiguous, and the jury remains unable to determine what the parties intended after considering all relevant extrinsic evidence, the jury should only then find in favor of the nondrafter of the contract pursuant to the rule of *contra proferentem*. [*Id.* at 470-472 (citations omitted) (emphasis added).]

Particularly given that the trial court did not grant summary disposition in favor of Shmina or Platinum on this basis, and did not articulate any consideration of relevant extrinsic evidence or

other means and rules of contract interpretation, we decline to introduce and apply the *contra proferentem* canon of construction at this juncture of the proceedings.

IV. UNRESOLVED CLAIMS

Finally, OHM argues that the trial court improperly failed to resolve its cross-claims that Shmina and Platinum breached their contracts by failing to purchase sufficient project liability insurance. We conclude that OHM has waived this issue by stipulating to dismissal of the case.

“A stipulation is an agreement, admission, or concession made by the parties in a legal action with regard to a matter related to the case.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). A stipulation is construed in the same manner as a contract. *Bd of Co Rd Comm’rs for Eaton Co v Schultz*, 205 Mich App 371, 379; 521 NW2d 847 (1994). When a stipulation is unambiguous, a court will enforce it as written. See *id.* at 380. “[A] waiver is a voluntary and intentional abandonment of a known right.” *Quality Prods*, 469 Mich at 374. A party may not appeal an error that the party created. *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 555; 840 NW2d 375 (2013).

In this case, the parties filed a stipulated order dismissing the case. The order stated that it “resolve[d] the last pending claim and close[d] the case.” By signing this stipulation, OHM agreed that there were no additional claims that the trial court should address. We will not allow OHM to appeal an error that OHM itself helped create, and we therefore conclude that OHM has waived this issue by stipulating to dismissal of the case.

Affirmed with respect to the trial court’s denial of OHM’s motion for summary disposition. Vacated with respect to the trial court’s grant of summary disposition in favor of Shmina and Platinum. Remanded for reinstatement of OHM’s claims for indemnification and further proceedings consistent with this opinion. Because the principal issue in this case came before this Court after the trial court sua sponte raised the application of MCL 691.991(2), because this Court ordered supplemental briefing on the issue on its own motion, and because the issue is of public importance, each party shall bear its own costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause